GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 15594 of David H. Marlin, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Joseph F. Bottner, Jr., Zoning Administrator, made on July 23, 1991, to the effect that Mr. and Mrs. Stephen Granger may erect a fence on the property line between their house and the Marlins' in violation of the Board's order dated October 31, 1974, that trees be planted "on the property line" in lieu of a fence for residences in an R-1-B District at premises 3615 Macomb Street, N.W. (Granger) and 3601 Macomb Street, N.W. (Marlin), (Square 1918, Lots 33, and 803-805).

HEARING DATE: December 18, 1991
DECISION DATE: January 8, 1992

ORDER

SUMMARY OF EVIDENCE OF RECORD:

1. This appeal involves two adjacent properties; 3601 Macomb Street, N.W. owned by the appellant, David Marlin and his wife Jaclin Marlin; and 3615 Macomb Street currently owned by Dr. and Mrs. Stephen Granger. The previous owners of 3615 Macomb Street are Mr. and Mrs. William Howell.

2. In 1974, while the Marlins and Howells were neighbors, the Marlins expressed an interest in constructing a screened-in porch at the rear on the west side of their house. An architect was hired to prepare plans and he informed the Marlins that they would need variance relief before a building permit could be issued for the new construction.

3. The Marlins immediately consulted the Howells, showed them their architectural plans and sought their agreement to the planned construction. The Howells were concerned that a portion of the proposed porch would be elevated about six feet from the ground (but only about two feet from the sidewalk) and might permit persons on the porch to see into the their house through the east windows. The Marlins offered to provide screening by trees or shrubbery to protect the Howells' privacy. Mrs. Howell, who took the leading role, declined the offer to plant trees or shrubbery and opposed the construction.

4. At the hearing before the Board on July 17, 1974, Mrs. Howell testified in opposition to the application, stating that the proposed porch would interfere with her privacy and create an expense by forcing her to erect a "screening structure." The Marlins expressed a willingness to "make reasonable adjustments to protect" their neighbors' privacy.

5. The Board granted the Marlins' application. By BZA Order No. 11679 dated September 19, 1974, the Board approved the construction of the porch with the following condition:

> That the side of the proposed screened porch which will face the property owned by Mrs. William Howell at 3562 Macomb Street, N.W., be enclosed by an opaque material for the purpose of shielding the view of the home at 3562 Macomb Street, N.W.

6. After the order was issued, the Marlins offered to plant trees or bushes as a substitute for the wall, to ensure the Howells' privacy. Ultimately the parties agreed. The Marlins stated that they were willing to pay the majority of the costs. They agreed that Mrs. Howell could select the screening she desired from the nursery of her choice and that she could fully supervise the planting. Both the Howells and the Marlins agreed that the screening was to be planted on the property line.

7. By letter dated October 24, 1974, the parties requested that the Board amend its September 19, 1974 order, eliminating the one condition and substituting in its place the following conditions:

A. That there shall be planted on the property line between the property owned by Mr. and Mrs. William L. Howell and the property of Mr. and Mrs. David H. Marlin a screen of evergreen trees mutually satisfactory to the respective owners that will shield the view between the properties, the cost thereof being shared five (5) parts by Mr. and Mrs. Howell and seven parts (7) by Mr. and Mrs. Marlin.

B. That the respective property owners file with the Recorder of Deeds a covenant running with the land to mutually bind the property owners to maintain a screen between the properties in perpetuity.

C. That no building permit is to be issued for the addition of the porch until the evergreen screening between the two properties is in place.

8. By amended order dated October 31, 1974, the Board accepted the new conditions proposed by the parties except that it did not require the filing of a convenant running with the land. The Board conditioned its amended order as follows:

1. That there shall be planted on the property line between the property owned by Mr. and Mrs. Howell and the property of Mr. and Mrs. David H. Marlin a screen of evergreen trees mutually satisfactory to the respective owner [sic] that will shield the view between the properties.

2. That no certificate of occupancy shall issue until the evergreen trees are planted and in place.

9. Mrs. Howell then took charge of the selection, purchase, and planting of the trees. She decided that three magnolia trees would provide the required screening. The Marlins bore 7/12 of the cost of these trees and the Howells bore 5/12 of the cost. Mrs. Howell later decided that a fourth magnolia tree would enhance the properties. The Marlins cooperated but because this fourth tree was unnecessasry to satisfy the Board's order, the cost was shared 50-50.

10. In a letter dated February 13, 1975 and signed by the Marlins and the Howells, the Board was informed that the evergreen trees referred to in BZA Order No. 11679 "are planted, in place and are mutually satisfactory to the respective property owners."

11. In about 1983, the Howells sold their property to the Grangers. Sometime in 1989, the Grangers expressed an interest in erecting a fence on their property one inch from the property line. They proposed to place the fence on the Marlins' side of the trees thereby enclosing the trees in their yard. The Marlins opposed the erection of a fence unless it would be placed on the Grangers' side of the trees. This is because they believed that the trees had been placed on the property line. The trees were actually planted between 18 inches and three feet inside the yard then belonging to the Howells (now owned by the Grangers). The Grangers submitted an application for a permit to construct a fence on private property. On July 23, 1991, the Zoning Administrator decided to issue the permit. It is this decision that the appellant, David Marlin, maintains is in error.

12. At the hearing on this appeal, the appellant argued that to allow the fence to be constructed will:

a) deprive the appellants of their ownership interest in the trees;

b) deprive the appellants of the value of their property enhanced by the trees;

c) violate the 1974 agreement between the Marlins and the Howells; and

d) violate the Board's amended order.

13. The appellant argued that he and his wife would not have offered to pay the majority of the cost of the trees if they had known that they would be deprived of the benefit of the trees. The

appellant maintains that because of his financial contribution to the trees he has an ownership interest in them and this interest should be protected.

14. The appellant stated that it is generally accepted as a principle of law that a tree whose trunk stands wholly on the land of one person belongs to that person. The applicant stipulated that the trunks of the four magnolia trees were planted on the Howell's property. However, this was done entirely without their knowledge or approval. The appellant maintains that even if he had consented to some deviation from planting on the property line for topographical reasons, these trees would not "belong" to the Howells, or now the Grangers. This is because there is a recognized exception to the principle that the location of a trunk determines ownership. This exception deals with "boundary trees." A boundary tree is a tree that stands on or near a boundary line because neighbors either jointly plant it, tend to it, or treat it as a boundary between their properties and reap proportionate benefits. See Cal. Civ. Code sec. 834; N.D. Cent. Code Ann. 47-01-17; 60 Okla. Stat. Ann. 67, 68. Louisiana'a statute, La. Civil Code 687, creates a presumption of common ownership when trees are located on the line. This presumption means that the tree is commonly owned unless one neighbor proves otherwise, for instance, that one owner planted it and only one always tended it. See also Weisel v. Hobbs, 138 Neb. 656, 294 N.W. 448 (1948) and Rhodig v. Keck, 161 Colo. 421 p.2d 729 (1966).

15. The appellant maintains that without a doubt, the four magnolia trees are boundary trees, mutually intended as such by the Howells and the Marlins. This is evidenced by the requirement that they be placed on the property line, a stipulation arrived at freely by the parties, submitted to the Board and incorporated into the law of this case.

The appellant further argued that there are circumstances in which trees are regarded in the law as fences. See Neighbor Law, Cora Jordan, Esq., Nolo Press (1991), 6-2, 11-13, 14. Rows of boundary trees planted close together, that grow close together, and spread to form a barrier, can be considered fences. Then the universal rule of tree ownership is effected. The appellant maintains the Grangers' intent is similar to erecting a spite fence, an act often forbidden by the courts.

A boundary fence is a fence that is located on the line between two properties and is used by both owners. It may be called a division fence or a partition fence. Fences on or near or intended to be on a boundary are owned by both property owners when both are using the fence. Neither may remove it or convert it, without the other's permission. When either of the properties is sold, the new owner purchases the mutual ownership in the fence.

Ibid, 11-14. The appellant argued that the magnolia trees, whether regarded as a fence or not, clearly have been used by both neighbors with proportionate benefits.

16. The appellant maintains that because both property owners have an interest in the trees, the Grangers should not be allowed to erect a fence that would enclose the trees in their yard. He argued that the Zoning Administrator erred in issuing a permit to construct the fence and he is requesting that that decision be reversed. The appellant is also requesting that the Board seek an agreement by the parties to one of the following four resolutions:

a) The parties shall replant the existing magnolia trees on the property line.

b) The parties shall plant different trees or other screening on the property line.

c) The parties shall plant additional screening on the property line, adjacent to the present magnolia trees. Additional screening will allow the Grangers to cut down any of the branches of the Magnolia tree that they wish to, freeing them to use their property as they would like.

d) The Grangers may build a fence on their land provided that they pay the Marlins the 1992 market value of the present magnolia trees and compensate the Marlins for the decrease in property value resulting from the loss of the trees.

17. The Zoning Administrator, Joseph F. Bottner testified at the hearing in opposition to the appeal. The Zoning Administrator stated that on February 27, 1991, an application was filed for Dr. & Mrs. Granger requesting permission to construct a fence on their own property at 3615 Macomb Street, N.W. The fence permit application was approved by the Zoning Division on February 27, 1991. On February 28, 1991, he received a letter from Mr. Marlin advising him that he had concerns over the Grangers' right to construct a fence due to conditions of the Board's order in Application No. 11679, dated October 31, 1974.

After reviewing the files in this application, the Zoning Administrator advised the Marlins, by letter dated July 23, 1991, that in his opinion the Grangers have a right to erect a fence along their property line provided that they obtain the proper permits. In the letter, he expressed the understanding that the proposed fence will not serve as a substitute for the required screening in Application No. 11679. He further stated that

documents on record, especially the February 13, 1975 letter signed by the Marlins and the Howells, informed him that the screening was properly installed and agreed upon by all parties involved.

The Zoning Administrator testified about the circumstances surrounding the 1974 application. He noted however that the restrictive covenant was never recorded. Based on the above factors, the Zoning Administrator approved the request to erect the fence. The permit is now awaiting the approval of the Historic Preservation Review Board, pending the outcome of this appeal.

18. In response to the testimony of the Zoning Administrator, the appellant stated that zoning law is the application of law and equitable principles to regulate the use of land. He stated that the Zoning Administrator's decision and testimony ignore the equities inherent in the case and rely totally on technical grounds, namely that

a) the fence can be built on the Grangers land;

b) the fence will not substitute for the evergreen trees; and

c) both the Marlins and the Howells notified the Board that the trees were properly installed.

19. The appellant pointed out that the Zoning Administrator failed to mention the requirement that the trees be placed on the property line and the inequities that would result if that requirement were not fulfilled. Further, the Zoning Administrator does not acknowledge that the trees were intended to serve as a fence to mark the boundary line and to provide the above ground screening agreed upon. Therefore, the appellant stated, the Zoning Administrator's decision is not responsive to the issues in the case and should be reversed.

20. The Grangers appeared at the hearing as intervenors and testified in opposition to the appeal. The Grangers stated that they rely on the arguments in their memorandum submitted to the Board on December 17, 1991.

The Grangers stated that they wish to build a fence for a sense of enclosure and screening. They also wish to enjoy their property in its entirety and a fence will help in this regard.

The Grangers stated that the proposed fence will not harm the Marlins. First, the fence will be placed entirely on their own property, not the property line. Therefore, the Marlins are not being asked to pay for any portion of the fence.

Secondly, the fence will be erected so that the outside of the fence will face the Marlin's property. The stakes on the fence will face the Grangers.

Thirdly, the Grangers maintain that they will not move, remove or harm the magnolia trees. There are no lower branches on the Marlins' side of the trees so putting the fence there will not interfere with the trees.

Finally, the Grangers stated that they are willing to plant more ivy at the fence to create a green screen if the Marlins would like them to.

21. In opposing the appeal, the Grangers argued that the Marlins and Howells did not intend for the trees to be a substitute for a fence. They pointed out that the Board's order does not discuss a fence and if the parties intended for the trees to substitute for a fence, they would have expressed this in their communications to the Board. In the Grangers' view, the Howells and the Marlins did not have a mutual interest in the trees. The Howells were attempting to get screening from the use of the porch, and the Marlins were trying to avoid having to construct an opaque wall on their porch. Therefore, while both parties were dissatisfied with the Board's initial order, they had different reasons for their dissatisfaction.

The Grangers argued that the cases cited by the appellant involving boundary trees are irrelevant because it is clear that these trees were intended to provide screening, not to mark the boundary line between the two properties. The fact that the appellant failed to pay attention to the exact location of the property line when the trees were being planted demonstrates this intention only to provide screening.

The Grangers argued that the Board's order does not alter their right to have a fence. The parties agreed that trees would be planted on the property line as screening to benefit the Grangers' property if the opaque wall requirement would be eliminated to benefit the Marlins' property. The fact that the trees were not planted on the property line does not alter their function as screening or alter the Marlins' right to build a wall that is not opaque. Requesting a permit to build a fence does not alter the intent or effect of the Board's order. Therefore, the Grangers argued that the Board's order does not prohibit the construction of a fence on their property.

Finally, the Grangers maintain that the appellant has failed to prove that the Zoning Administrator erred in deciding to issue the building permit for the fence.

FINDINGS OF FACT:

Based on the foregoing evidence of record the Board finds as follows:

1. In 1974, the Marlins and the Howells intended to provide evergreen screening between their properties.

2. The trees selected were planted on the Howells' property without the Marlins' knowledge.

3. Nothing in the statements or documents submitted to the Board by the Marlins or the Howells expressed an intention to prohibit the erection of a fence between the properties.

4. Neither the Marlin nor the Howells clearly expressed an intention to have the trees serve as boundary markers.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the appellant is seeking to reverse the decision of the Zoning Administrator to issue a building permit for the construction of a fence on property owned by the appellant's adjoining neighbor.

In the instant appeal, the Board is to determine whether the Zoning Administrator violated the conditions of Board Order No. 11679 when he decided to issue a building permit for the construction of a fence at 3615 Macomb Street, N.W.

The Board is of the opinion that BZA Order No. 11679, dated September 19, 1974, was intended to approve the construction of a porch on the appellant's property and to shield the intervenors' property from the view of persons using the appellant's porch. The purpose of the original condition is expressly stated in the original order.

The Board is of the opinion that the purpose of amending BZA Order No. 11679 was to substitute for the opaque wall a screen of evergreen trees. The Board is of the view that the original intention to provide screening did not change in the amended order to an intention to mark the boundary line between the properties.

The Board concludes that the intervenors propose to construct a fence on their own property. The fence will not alter the location of the trees or interfere with the screening provided by them. The Board concludes therefore that the decision of the Zoning Administrator to issue the building permit leaves intact the

intent of BZA Order No. 11679. While it may be that the 1974 building permit for the construction of the appellant's porch should not have been issued until the trees were planted on the property line, this factor does not affect the current proposal to construct a fence or the Zoning Administrator's decision now before the Board.

In light of the foregoing, the Board concludes that the appeal is **DENIED** and the decision of the Zoning Administrator is **UPHELD.**

VOTE: 4-0 (Charles R. Norris, Sheri M. Pruitt, Paula L. Jewell and Carrie L. Thornhill to deny; Maybelle Taylor Bennett not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Madeliene H. Robinson
MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: DEC 29 1992

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

15594Order/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15594

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on DEC 29 1992 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Mr. and Mrs. David Marlin
3601 Macomb Street, N.W.
Washington, D.C. 20016

Mr. and Mrs. Stephen Granger
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Washington, D.C. 20016

Patricia H. Howell
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Washington, D.C. 20016

Jocelina Brunson
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Patricia Wamsley, Chairperson
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2737 Devonshire Place, N.W.
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Madeliene H. Robinson

MADELIENE H. ROBINSON
Acting Director

DATE: DEC 29 1992

15594Att/bhs